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80-1847

No. _____

IN THE

Supreme Court of the United States

October Term, 1980

UNITED STATES OF AMERICA,

Respondent,

v.

R. V. WILSON AND GARLAND LINCECUM,

Petitioners.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

1. Were the offenses for which Wilson and Lincecum were accused barred by the applicable statute of limitations?

PARTIES

In the United States Court of Appeals for the Ninth Circuit, the parties were: R. V. Wilson, Jr., and Garland H. Lincecum, Jr., Petitioners-Appellants, and United States of America, Respondent-Appellee.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners, R. V. WILSON and GARLAND LINCECUM, hereby petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINION BELOW

The opinion of the Court of Appeals (Appendix A, *infra*, p. A-1) is a memorandum decision. Therefore, no citation is available. The District Court issued no written opinion.

JURISDICTION

The opinion of the Court of Appeals was issued on 3 December 1980. Rehearing was requested on 17 December 1980 and denied on 17 February 1981. Judgment was entered on 5 March 1981. The jurisdiction of the Supreme Court to review this case on Petition for Writ of Certiorari is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES AND RULES INVOLVED

Title 18 United States Code § 3282 provides in pertinent part:

> "Except as otherwise expressly provided by law, no person shall be prosecuted, tried or punished for any offense, not capital, unless the Indictment is found or the Information is instituted within five (5) years next after such offense shall have been committed."

Title 18 United States Code § 3288 provides in pertinent part:

> "Whenever an Indictment is dismissed for any error, defect or irregularity, with respect to the Grand Jury, or an Indictment or Information filed after the defendant waives an open court prosecution by Indictment is found otherwise defective or insufficient for any cause, after the period prescribed by the applicable statute of limitations has expired, a new Indictment may be returned in the appropriate jurisdiction within six (6) calendar months of the date of the dismissal of the Indictment or Information, or, if no regular Grand Jury is in session in the appropriate jurisdiction when the Indictment or Information is dismissed, within six (6) calendar months of the date when the next regular Grand Jury is convening, which new Indictment shall not be barred by any statute of limitations."

Rule 48 of the Federal Rules of Criminal Procedure provides in pertinent part:

"The Attorney General, or the United States Attorney may by leave of court file a dismissal of an Indictment, Information or Complaint and the prosecution shall thereupon terminate."

STATEMENT OF THE CASE

This case concerns the propriety of a trial court's failure to dismiss this case on the basis that the offenses were barred by the statute of limitations. Wilson and Lincecum contend that since the original Indictment in this matter was dismissed at the request of the United States Attorney, said Indictment failed to toll the statute of limitations and for this reason, the later superseding Indictment was untimely.

Wilson and Lincecum were originally charged in a five count Indictment on May 18, 1978. Counts 1 through 4 of the Indictment charged violations of Title 18 United States Code § 2314, alleging that the defendants had fraudulently induced some persons to travel in interstate commerce in execution of an alleged scheme and artifice to defraud in an amount of $5,000.00 or more. Count 5 alleged mail fraud and aiding and abetting in mail fraud, in violation of Title 18 United States Code §§ 1341 and 1342, in execution of this scheme and artifice to defraud. The original Indictment, returned May 18, 1978, charged the commission of a scheme with overt acts in furtherance thereof covering the period May 26, 1973 through September 1, 1973.

On July 26, 1978, both defendants pled not guilty to all counts charged. On November 6, 1978, the Government moved to dismiss Counts 1 through 4 of the Indictment. This Motion was granted without prejudice. On November 8, 1978, a five count superseding Indictment was filed.

Wilson and Lincecum moved to dismiss Counts 1 through 4 of the superseding Indictment on the basis that they were time barred. In essence, their argument was that since the original Indictment was dismissed at the request of the Government and not for any irregularity or defect occurring in the proceeding before the Grand Jury, the original Indictment failed to toll the statute of limitations, and the six month extension of time provided by Title 18 United States Code § 3288, was inapplicable. Prior to dismissal of the original Indictment, Wilson and Lincecum challenged the Grand Jury proceeding. At oral argument on this Motion, the judge failed to consider the Motion of Wilson and Lincecum. Instead, the following discussion and Motion was raised by the Assistant United States Attorney:

> "MR. SACKS: Your Honor, it might make it easier for their argument if I may address the Court first.
>
> The Government is going to have somewhat of a change of position with reference to the materials that were requested by the defendants. We are going to let them see the entire investigative report and they can see that beginning Thursday of this week.
>
> We have two months prior to trial. That should give them more than ample time to see everything the Government has, so we will withdraw our initial opposition.
>
> Secondly, the Government is going to move to dismiss the counts in this Indictment, the ones that were inadequate, *without agreeing that they are inadequate*, but just to avoid any misgivings that we may have later, we are going to resubmit this this Wednesday to the Grand Jury. However, as the Court will notice, the statute of limitations would have run under Section 3288 of Title 18, which would give us an additional six months to bring this before a Grand Jury.
>
> We are going to ask that this Court dismiss those counts today, so that they can be submitted to the Grand Jury on Wednesday." (Emphasis added.)

Thus, at the time Counts 1 through 4 were dismissed by the Court, it was at the request of the Government, and in fact, the Court acted on the Motion of the Government. The Government, at that time, misplaced reliance upon Title 18 United States Code § 3288, by believing it was entitled to an additional six months. However, it is readily apparent, that the dismissal of this Indictment, at the request of the Government, and without any specific finding that the Indictment was technically defective, was made pursuant to Rule 48 of the Federal Rules of Criminal Procedure. Therefore, the six month extension of time in which to proceed was not allowable. Additionally, since the original Indictment had been dismissed at the request of the Government, it failed to toll the applicable statute of limitations.

On November 8, 1978, the United States Grand Jury for the District of Arizona, returned a superseding Indictment charging the same offenses as the Indictment of May 8, 1978. On December 7, 1978, Wilson and Lincecum moved to dismiss this Indictment on the basis that the applicable statute of limitations barred further prosecution. This Motion was denied, and following trial to a jury, Wilson and Lincecum were found guilty of all five counts. Wilson was sentenced to seven years imprisonment on Counts 1, 2, 3 and 4 and five years on Count 5, with all such sentences to run concurrently. Lincecum was sentenced to six years imprisonment on Counts 1, 2, 3 and 4 and five years as to Count 5, said sentences to run concurrently.

Wilson and Lincecum filed timely notices of appeals from their convictions on January 15, 1980. Their convictions were affirmed by the United States Court of Appeals for the Ninth Circuit in a Memorandum opinion filed on December 3, 1980.

Wilson and Lincecum are both presently incarcerated at the Federal Correctional Institute at LaTuna, Texas pending disposition of this appeal.

REASON FOR GRANTING THE WRIT

Wilson and Lincecum contend that the Writ should be granted for the reason that the Court of Appeals has decided an important question of Federal law which has not been, but should be, settled by this Court. Wilson and Lincecum contend that this action is barred by the applicable statute of limitations, Title 18 United States Code § 3282. Specifically, the dismissal that occurred on November 6, 1978, at the Assistant United States Attorney's request, was pursuant to Rule 48 of the Federal Rules of Criminal Procedure, and therefore, the six month extension of time provided by Title 18 United States Code § 3288 is inapplicable.

Title 18 United States Code § 3288 allows a six-month extension of time when an Indictment is dismissed for any error, defect or irregularity with respect to the Grand Jury, or is found otherwise defective or insufficient for any cause. Additionally, it applies only if the defect is found when the period of limitations has already run.

In the case at bar, there is no question that the trial court did not fully adhere to the spirit and mandate of Title 18 United States Code § 3288. When the original Indictment in this matter was dismissed on November 6, 1978, it was not on the basis of any error, defect or irregularity with respect to the Grand Jury and was not found defective or insufficient for any other cause. It is clear that it is up to the Court to find that a defect or irregularity occurred. No such finding

was made in the instant case. Instead, the prosecution specifically refused to agree that the Indictment was inadequate and the Court made no finding to the contrary.

Based upon the dates charged in the Indictment, and in consideration of the applicable statute of limitations, this prosecution would have been barred but for the Indictment that eventually was dismissed. Since it was dismissed at the occasion of the United States Attorney's Office, and not for any error, defect or irregularity, it is apparent that Rule 48 of the Federal Rules of Criminal Procedure is controlling and not Title 18 United States Code § 3288.

Rule 48 of the Federal Rules of Criminal Procedure provides for discretionary dismissals at the request of the United States Attorney's Office. Professor Wright, in his treatise on the Federal Rules of Criminal Procedure, has stated that the provisions of Title 18 United States Code § 3288, extending the statute of limitations in some circumstances, do not apply where the prosecution has filed a dismissal. See Wright, *Federal Practice and Procedure*: Criminal § 812, n.10.

Additionally, Professor Moore in his treatise on the Federal Rules of Criminal Procedure, has indicated that the time which elapses during the pendency of the first Indictment is not deducted from the period of limitations on the Government's Motion to Dismiss pursuant to Rule 48. See J. Moore, *Federal Practice*: ¶ 48-02[3], n.29.

In the case at bar, the May 18, 1978 Indictment was dismissed on the Motion of the Government. The time elapsing during this Indictment's pendency is not deducted from the period of limitations. Since the second Indictment was returned on November 8, 1978, and the acts charged occurred between May and September, 1973, the charges are

barred by the five-year period of limitations set forth in Title 18 United States Code § 3288.

Additionally, the United States Court of Appeals for the Ninth Circuit has apparently decided this case in conflict with the United States Court of Appeals for the Eighth Circuit. In *DeMarrias v. United States*, 487 F.2d 19 (8th Cir. 1973), the Court held that Title 18 United States Code § 3288 is not controlling as to discretionary dismissals of Indictments. Instead, the Court found that Federal Rule of Criminal Procedure, 48(a) controls when the dismissal is occasioned at the request of the Government and the six-month extension of time does not apply.

In *United States v. Moriarty*, 327 F. Supp. 1045 (D.C.E. D Wis. 1971), a similar argument was before the Court. In *Moriarity*, the Government as a sole ground for its Motion to Dismiss the Indictment advanced that the interest of justice demands no further prosecution. On appeal, the Government argued that such reason was broad enough to encompass irregularities in the Grand Jury proceedings, thus bringing the case under the protection and six-month extension of time provided for in 18 United States Code § 3288. The District Court sustained the defendant's position in holding:

> "Section 3288 is specific in its requirement that an otherwise time barred count can be allowed only if the earlier dismissal related to irregularities occurring in connection with Grand Jury proceedings. *In the absence of a showing that the dismissal was for such reason, it cannot be held that the running of the period of limitations has been tolled.* The prosecution's statement that the 'interest of justice' required the dismissal in question is simply too sweeping to save the Government's action. The defendant's motion to dismiss the

first counts of the Indictment in 70-CR-85 and 70-CR-86 will be granted." (Emphasis added.)

In the case at bar, the Government's sole basis for dismissing the instant Indictment was "so we don't have any misgivings about it later". This clearly is not a dismissal on the basis of a defect or irregularity occurring in connection with the Grand Jury proceedings contemplated by Title 18 United States Code § 3288. Additionally, since the time that elapsed during the pendency of the original Indictment is not deducted from the period of limitations, and since the six-month extension of time is inapplicable, Counts 1 through 4 of this case are time barred. Wilson and Lincecum contend that this is an important question and should be resolved and request that this Court exercise its discretionary power and grant the Writ.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the Judgment and opinion of the Ninth Circuit.

RESPECTFULLY SUBMITTED,

DEBUS & KAZAN, LTD.

By Larry L. Debus
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HENRY, KIMERER, LaVELLE & ERLICHMAN

By Michael D. Kimerer
Attorneys for Petitioner LINCECUM

Three (3) copies of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit have been mailed this 17th day of April, 1981, to the office of:

The Solicitor General
Department of Justice
Washington, D.C. 20530

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

R. V. Wilson, Jr., and Garland H. Lincecum, Jr., Petitioners-Appellants, vs. United States of America, Respondent-Appellee.	(Filed: December 3, 1980 Nos. 80-1032/1033 MEMORANDUM

On Appeal from the United States District Court
for the District of Arizona
William P. Copple, District Judge, Presiding
Argued and Submitted October 14, 1980

Before: SKOPIL and POOLE, Circuit Judges, and TAKASUGI,* District Judge

Appellants appeal their conviction on all five counts of a superseding indictment charging violations of (1) 18 U.S.C. § 2314 - knowingly devising a scheme to defraud and inducing persons to travel in interstate commerce in execution or concealment of the scheme; (2) 18 U.S.C. § 1341-using the mails in furtherance of that scheme; and (3) 18 U.S.C. § 2 - aiding and abetting.

On this appeal appellants contend that the superseding indictment was time barred; that the evidence established two schemes, resulting in a fatal variance between the indictment and proof; that it failed to establish their intent to defraud; and that the prosecutor's conduct in the closing argument constituted plain error requiring reversal. We affirm the convictions.

The superseding indictment was timely. The original

*Honorable Robert N. Takasugi, United States District Judge, Central District of California, sitting by designation.

indictment, returned May 18, 1978, charged the commission by appellants of a scheme with overt acts in furtherance thereof covering the period May 26, 1973 through September 1, 1973. The filing of the May indictment tolled the running of the five year statute of limitations with at least eight days remaining. *U.S. v. Wilsey*, 458 F.2d 11, 12 (9th Cir. 1972); *U.S. v. Garcia*, 412 F.2d 999 (10th Cir. 1969). Claiming a pleading defect appellants moved to dismiss. Although the government disputed this challenge it advised the court that it would seek a new indictment, on the faith of which the court dismissed the pending indictment on November 6, 1978. The statute of limitations thereupon again began to run, but its running was again stopped two days later on November 8, 1978, when the superseding indictment was returned.

The statutory period of limitations thus had not expired, and even if it had, as appellants' contend, the superseding indictment would have been timely under 18 U.S.C. § 3288. That statute allows the prosecutor to return a new indictment, where the statutory period has already run, within six months following the dismissal of the original indictment. Here the prosecutor did so within two days.

In considering appellants' claim of insufficient evidence we must view the evidence in the light most favorable to the prosecution. *Glasser v. U.S.*, 315 U.S. 60 (1942); *U. S. v. Lutz*, 621 F.2d 940 (9th Cir. 1980). We find the evidence sufficient to support the jury's verdict of a unitary scheme with intent to defraud. The alleged variance, if it did exist, was one of form not substance and therefore not fatal. *Berger v. U.S.*, 295 U.S. 78, 82-83 (1935).

The allegations of prosecutorial misconduct are also without merit. All of the statements complained of were within

the bounds of advocacy and responded to remarks made by defense counsel during his summation. *U.S. v. Moulton*, 617 F.2d 1379 (9th Cir. 1980); *U.S. v. Fulton*, 549 F.2d 1325 (9th Cir. 1977).

AFFIRMED.

(Title of Action)
(FILED: February 17, 1981)

ORDER

Before: SKOPIL and POOLE, Circuit Judges, and TAKASUGI,* District Judge

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion. Fed. R. App. R. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

*Honorable Robert M. Takasugi, United States District Judge for the Central District of California, sitting by designation.